No. 47875-7-II
Pierce County Superior Court Cause No. 14-2-08279-2

IN THE COURT OF APPEALS, DIVISION TWO FOR THE STATE OF WASHINGTON

HARDER MECHANICAL, INC.,

Appellant,

v.

PATRICK A. TIERNEY, and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondents.

BRIEF OF APPELLANT

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I. Introduction

When is an employee's relationship to work intermittent so that his monthly wages for purposes of workers' compensation must be calculated under RCW 51.08.178(2)? What factors must a court consider when determining if an employee's relationship to work is intermittent? Those are the questions this appeal seeks to clarify.

The employee Patrick A. Tierney, a Respondent on this appeal, sustained a shoulder injury on April 11, 2012, while working as a pipefitter for the Appellant, Harder Mechanical ("Harder"), in Longview Washington. He then filed a worker's compensation claim against Harder under the Washington Industrial Insurance Act. This case arose out of a wage rate dispute that developed much later. The central question: was Mr. Tierney a full-time worker whose monthly wages should be calculated under the default statutory provision RCW 51.08.178(1), or, as the Appellant Harder Mechanical contends, was Mr. Tierney's employment or his *relationship to his employment* essentially part-time or intermittent requiring that his monthly wage be calculated pursuant to RCW 51.08.178(2)?

At the time of the injury, Mr. Tierney had worked for Harder for a total of 24 hours on a job that was expected to last 4 days. He earned $36.87 per hour in that position. As a pipefitter and plumber by trade and training, Mr. Tierney was a member of the United Association of Plumbers and Pipefitters ("UA") Local 26, an international, multicraft

trade union, from which Mr. Tierney was dispatched to jobs, including the job in which he was injured.

Mr. Tierney was a journeyman pipefitter and plumber with over 20 years of experience who also possessed additional certifications, such as those permitting him to work on refrigeration and work with special gases, that should have made him eligible for a broad range of jobs. He also made himself available to dispatch in all seven zones of Local 26, meaning he would potentially receive dispatch calls to a larger selection of jobs. Nevertheless, Mr. Tierney very infrequently worked.

Mr. Tierney's dispatch history showed he missed dispatch calls and failed to report to at least a few jobs. He also was turned away for "failure to meet site requirements" and for other reasons. On one occasion, Mr. Tierney took a job on base at JBLM, only to be turned away at the gate because he was driving a vehicle without insurance.

His dispatch history showed sporadic and infrequent periods of work. For example, in the year prior to the April 11, 2012, industrial injury, Mr. Tierney only worked from April 13, 2011, through May 12, 2011; June 1, 2011; March 14, 2012, through March 27, 2012; and April 6, 2012, through the date of injury. He was incarcerated from September 2011 to January 2012 and missed additional dispatch calls while in jail. Between jobs, Mr. Tierney did not look for work, he just collected unemployment, which he was allowed to do as long as he kept his name on the union dispatch list. There was no penalty to Mr. Tierney's unemployment benefits if turned down jobs or missed dispatch calls.

Yet Mr. Tierney has maintained that he intended to work full time, so his wage rate should be calculated under the default provision of RCW 51.08.178(1). He contends his intent to work full time is evidenced by putting his name on the Local 26 dispatch lists and receiving unemployment benefits when he was not working. The Department of Labor and Industries ("the Department"), Board of Industrial Insurance Appeals ("BIIA" or "the Board"), and Pierce County Superior Court all ultimately agreed with Mr. Tierney. In fact, the Department order that forms the basis for this appeal determined Mr. Tierney's monthly wage was $7,930.56 (more money than he had earned in the entirety of 2012 prior to the industrial injury).

Harder contends the law and facts dictate a different outcome, as Mr. Tierney's actions speak louder than his words. Despite the apparently sparse availability of jobs and Mr. Tierney's stated intent to work full-time, he missed dispatch calls, turned jobs back in, failed to report to job sites, and failed to take actions (such as maintaining car insurance) necessary to access job sites. Because of the regulations governing unemployment benefits for members of dispatching labor unions, Mr. Tierney was not required to participate in job searches while on receiving unemployment benefits; there were no consequences to his unemployment benefits when he missed dispatch calls, did not report to jobsites, etc. These actions contributed to the long-established intermittent pattern and relationship between Mr. Tierney and his employment. At the time Mr. Tierney was injured, this pattern had not changed, and there was

nothing about his job at the time of injury or his employment relationship with Harder that would have changed Mr. Tierney's expectations regarding his employment.

Harder contends the Superior Court misapplied the Washington Supreme Court's standard for determining if an employee's relationship to work is "essentially part-time or intermittent" by failing to consider certain factors that are integral to the Supreme Court's rule as stated in *Department of Labor and Industries. v. Avundes*, 140 Wn.2d 282 (2000). Harder also contends the facts found by the Superior Court do not support its legal conclusion. Harder begs the Court of Appeals to provide clarity on the correct legal standard and the application of the *Avundes* test and reverse the decision of the Superior Court.

II. Assignments of Error

1. The Superior Court erred in making a "finding of fact" that "Mr. Tierney's relationship to employment was not part-time or intermittent" (CP at 613, ¶ 7)[1], because the facts and evidence in a case do not support this conclusion. This finding is, at most, a mixed conclusion of law and fact and should be reviewed as a conclusion of law and insufficient facts and evidence exist to support this conclusion.

[1] As required by RAP 10.4(f), all citations to the Clerks Papers are designated "CP at [page number]. Verbatim Reports of Proceedings cover two different days of hearings, which are not consecutively paginated. As a result, this citations to the Verbatim Report of Proceedings are designated as "[date] RP at [page number]:[line number]." All exhibits accepted into the record at the original trial at the Board of Industrial Insurance Appeals have been included within the clerks papers and are referenced as such.

2. The Superior Court erred as a matter of fact in finding "Mr. Tierney intended to obtain full time work from the labor union" (CP at 613, ¶ 5), as this finding is not supported by substantial evidence.

3. The Superior Court erred in failing to find any facts regarding the "relation with the current employer," one of the key factors needed in applying the relevant legal test, despite evidence in the record supporting a finding of fact on this issue.

4. The Superior Court erred in failing to make a specific finding of fact regarding Mr. Tierney's employment history, one of the key factors needed to apply the relevant legal test, despite evidence in the record supporting a finding of fact on this issue.

5. The Superior Court erred as a matter of law in concluding "Harder Mechanical, Inc. failed to meet its burden and that substantial evidence supports the Board's Decision. Therefore, the court affirms the Board" (CP at 614, ¶ 2), as this conclusion is not supported by the facts and relies on a misapplication of the relevant legal standards.

6. The Superior Court erred as a matter of law in concluding "the relationship of Mr. Tierney to his work and the nature of his work was not part time or intermittent within the meaning of RCW 51.08.178(2)" (CP at 614, ¶ 5), as there are insufficient facts to support this conclusion and the Superior Court misapplied the

Avundes test (140 Wn.2d 282, 996 P.2d 593 (2000)) in reaching this conclusion.

7. The Superior Court erred as a matter of law in concluding "Mr. Tierney was a full time worker and his wages were correctly set by the Board of Industrial Insurance Appeals . . . ." (CP at 614, ¶ 6) as this conclusion also stems from the misapplication of the *Avundes* test.

8. The Superior Court erred as a matter of law in concluding "The Decision and Order of the Board of Industrial Insurance Appeals Dated March 31, 2014, is correct and is affirmed." (CP at 615, ¶ 7).

III. Statement of the Case

A. Procedural History

This case comes before the Court of Appeals on Harder's appeal from the July 24, 2015, Order of the Pierce County Superior Court. (CP at 612–22). Harder timely filed its Notice of Appeal on August 4, 2015. (CP at 623–24). The Superior Court appeal was itself an appeal of of the January 27, 2014, Decision and Order of the Board of Industrial Insurance Appeals ("the Board"). (CP at 57–66). Harder previously filed a timely Petition for Review with the Board on March 11, 2014 (CP at 24–36), which the Board denied on March 31, 2014. (CP at 20). In doing so, the Board made the Proposed Decision and Order of January 27, 2014, the "Decision and Order of the Board." (*Id.*).

The Decision and Order affirmed a February 12, 2013, order from the Department of Labor and Industries ("the Department"), which itself affirmed the Department's earlier order of December 20, 2012. (CP at 57). That decision reversed an earlier decision of the Department dated December 11, 2012, and ordered the Mr. Tierney's wage rate to be set using the formula for workers in full-time, nonintermittent employment found in RCW 51.08.178(1). (CP at 66). Mr. Tierney filed the underlying workers' compensation claim in connection with an April 11, 2012, shoulder injury sustained while he was working on a short-term project for Harder Mechanical Contractors, Inc., in Longview, Washington.

B. Facts Found at Trial

As a result of the bench trial at Pierce County Superior Court, the following facts were found:

> 1. Patrick Tierney was a member of the United Association of Plumbers and Pipefitters Local 26 in Tacoma, Washington. He had been referred by his union to work for Harder Mechanical, Inc.
>
> 2. Mr. Tierney sustained an industrial injury on April 11, 2012[,] while working for Harder Mechanical, Inc.
>
> 3. Mr. Tierney had been a member of Local 26 for many years and he obtained employment upon referral from the union to various employers by keeping his name on a dispatch list at the union hall.
>
> 4. Mr. Tierney made himself available to work in all seven geographic zones that Local 26 operated in, and made

himself available for work as a pipefitter and plumber.

5. Mr. Tierney intended to obtain full time work from the labor union. However, his work history in the five years prior to his industrial injury consisted of alternating periods of employment and unemployment. Mr. Tierney received unemployment benefits while unemployed.

6. The nature of pipefitting work and plumbing work is not part-time or intermittent.

7. Mr. Tierney's relationship to employment was not part-time or intermittent.

8. On April 11, 2012, Mr. Tierney was single with no dependent children. He earned $36.56[2] per hour.

9. Harder Mechanical, Inc. paid $8.50 per hour for Mr. Tierney's healthcare benefits.

10. Mr. Tierney was a full time worker, eight hours a day, five days a week.

(CP at 613–14).

As the assignments of error indicate, Harder contends several of these facts were found in error as they are not supported by substantial evidence. The evidence also supports additional findings of fact that were not made, but are essential to determining the central issue in the case, namely, whether Mr. Tierney's relationship to employment was intermittent.

[2] Earnings records maintained by Mr. Tierney's union actually show he earned $36.87 per hour in the 24 hours he worked for Harder. (CP at 490). This factual finding appears to have been based on the wage rate used by the Department in the original order on appeal, which the Superior Court upheld as correct.

C. Relevant Evidence in the Record

Harder contends that there is substantial evidence in the record that the Superior Court did not consider or discuss that provided the basis for findings of fact that were necessary to the application of the relevant law. A full, detailed discussion of this evidence, including a thorough explanation of the structure of Mr. Tierney's labor union, the dispatch process through which Mr. Tierney obtained jobs, and his education and employment history, can be found in Harder's Trial Brief at the Superior Court. (CP at 533–40).

Of these, there are several specific pieces of evidence Harder would like to highlight for the Court of Appeals.

Mr. Tierney testified that he was not ready, willing, and able to work at all times in the year before the injury. From September 2011 to January 2012 Mr. Tierney was incarcerated in the Pierce County Jail. (CP at 364:3–9). This incarceration was related to a "domestic violence problem" and Mr. Tierney pled guilty to felony second degree assault. (CP at 364:11–15). Mr. Tierney was unable to work while he was incarcerated (*id.*); he did not tell the union he was unavailable (or have anyone tell the union for him. (CP at 364–67).

Dispatch records show that during the five years leading up to the April 11, 2012, injury, Mr. Tierney failed to meet site requirements once, was rejected once, did not report twice, and turned the dispatch back in (meaning he notified the dispatcher in advance that he could not accept the job) twice. (CP at 490; *see also* CP at 533–38 (explaining the dispatch

history and termination reasons listed)). Call logs also reflect that Mr. Tierney missed dispatch calls (and therefore missed available work) on October 13, 2011; October 27, 2011; November 1, 2011; and October 4, 2011. (CP at 492–93; *see also* CP at 535–36). Mr. Tierney also missed a few other calls but the jobs were ultimately cancelled, so these do not represent missed work opportunities. (CP at 491–94).

Mr. Tierney testified he believed he "turned back in" the August 2, 2011, job because he was sick (CP at 371:18–72:2). However, Local 26 business manager Mr. Dines could not confirm that this was the case since the doctor's note on record was dated two weeks after the job Mr. Tierney turned back in (CP at 251:18–52:14), and Mr. Tierney admitted he did not know if this was the case. (CP at 372:2).

Mr. Tierney testified that one of the "did not report" job terminations on the dispatch history was due to a problem with his car insurance. Mr. Tierney did not have valid car insurance and could not gain access to the job, which was located on base at Fort Lewis. (CP at 374:12–24).

The evidence also shows Mr. Tierney had no expectations of permanent, full-time employment with Harder, the employer of injury. Uncontradicted testimony from Harder's witnesses indicated the job of injury was only expected to last 4 days (CP at 327:11) and there was no expectation Mr. Tierney's work for Harder on this 4-day job would lead to longer or more permanent employment. (CP at 328:5). In fact, Harder routinely employed a large workforce of permanent or steady workers that

make up roughly 1/3 to 1/2 of its workforce. (CP at 194:13–20). Harder requested additional temporary or project-based workers be dispatched from the union hall when Harder does not have enough workers to complete a job. (CP at 194:8–12). These temporary workers are not permanent, full-time Harder employees.

IV. Argument

A. Standard of Review

Pursuant to RCW 51.52.115, the Board's decision is prima facie correct, and the party challenging the Board's decision bears the burden of proof. RCW 51.52.115; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5 (1999). On appeal the superior court reviews the Board's decision de novo. *Dep't of Labor & Indus. v. Shirley*, 171 Wn. App. 770, 878 (2012). "On review, the superior court may substitute its own findings and decision for the Board's only if it finds 'from a fair preponderance of credible evidence, that the Board's findings and decision are incorrect.'" *Ruse*, 138 Wn.2d at 5 (quoting *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 390 (1992)) (internal quotation marks omitted).

RCW 51.52.140 provides in pertinent part that "[a]ppeal shall lie from the judgment of the superior court as in other civil cases." RCW 51.52.140. In appeals from the superior court's decision to the Court of Appeals, the Court of Appeals reviews "whether substantial evidence supports the trial court's factual findings and then review[s], de novo, whether the trial court's conclusions of law flow from the findings" *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 909 (2006) (citing

Ruse, 138 Wn.2d at 5). In these cases, the Court of Appeals' review is "the same as the superior court's and is based solely on the evidence presented to the Board." *Shirley*, 171 Wn. App. at 878 (citing *Dep't of Labor & Indus. v. Avundes*, 95 Wn. App. 265, 269–70 (1999)).

The court in *Rogers v. Department of Labor and Industries* described the Court of Appeals' role in appeals of workers' compensation cases in more detail. That court explained:

> This statutory review scheme results in a different role for the Court of Appeals than is typical for appeals of administrative decisions pursuant to, for example, the Administrative Procedure Act, where we sit in the same position as the superior court. To be clear, unlike in those cases, our review in workers' compensation cases is akin to our review of any other superior court trial judgment: "'review is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings.'"

Rogers v. Dep't of Labor & Indus., 151 Wn. App. 174, 180 (2009) (footnotes omitted) (citing *Ruse,* 138 Wash.2d at 5, 977 P.2d 570 (quoting *Young v. Dep't of Labor & Indus.,* 81 Wn. App. 123, 128 (1996)). Specifically, findings of fact are reviewed to determine if they are supported by substantial evidence. *Id.* at 180–81.

With regard to the Board of Industrial Insurance Appeal's original interpretation of the Industrial Insurance Act, appellate courts:

> [R]eview the Board's interpretation of the Industrial Insurance Act de novo to determine whether it has erroneously

> interpreted or applied the law. Deference to an agency's interpretation of a statute is appropriate when the agency is charged with administering the statute. However, deference is inappropriate when the agency interpretation conflicts with the statute.

Double D Hop Ranch v. Sanchez, 133 Wn.2d 793, 797 (1997) (internal footnotes and citations omitted).

B. Factual Disputes

1. The Court Erred in Finding as a Fact "Mr. Tierney's Relationship to Employment was Not Part-Time or Intermittent."

The Superior Court made a "finding of fact" that "Mr. Tierney's relationship to employment was not part-time or intermittent. This finding was actually a conclusion of law, and could not properly be found as a fact. Harder made this objection on the record (7/24/15 RP at 8:13–24, 9:8–13). As Section IV.C. *infra* discusses, whether a worker's "relation to his or her employment is essentially part-time or intermittent" is one of the legal conclusions that if reached, leads to a worker's wage rate being calculated under RCW 51.08.178(2)(b). There is a two-part test, the second part of which has four listed factors, that must be considered when determining if a worker's "relation to his or her employment is essentially part-time or intermittent." *Dep't of Labor and Indus. v. Avundes*, 140 Wn.2d 282, 290 (2000).

Thus, this conclusion is incorrectly listed as a finding of fact, and should be reviewed, not to see if it is supported by substantial evidence, but to see if the "whether the court's conclusions of law flow from the

findings." *Rogers*, 151 Wn. App. at 180. To conclude otherwise results in circular logic, that shortcuts the application of the *Avundes* test.

2. The Superior Court Erred in Finding "Mr. Tierney Intended to Obtain Full-Time Work from the Labor Union."

Harder contends the Superior Court erred in finding Mr. Tierney intended to obtain full-time work from the labor union (i.e., his intent was to be a full-time, and not part-time or intermittent worker). (CP at 613, ¶ 5). This factual finding is not supported by substantial evidence, and is in fact undercut by the bulk of evidence presented on this issue.

Harder does not dispute that Mr. Tierney *says* he intended to work full-time, but this is essentially the only evidence that supports this finding, and Mr. Tierney's testimony was undercut by his own actions. Mr. Tierney's professed intent to work full-time belies his actions, including failing to report for work, missing dispatch calls, failing to meet site requirements, and otherwise not making himself for the pipefitting and plumbing work that was available to him. (CP at 251, 364–67, 371–2, 374, 490, 492–93, 535–36). Further, the inference drawn from Mr. Tierney's receipt of unemployment benefits—that his receipt of benefits demonstrated his intent to work full-time—itself relies on the application of case law that is distinguishable. *See Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903 (2006); *see also* CP 550–51 (discussing *Watson* and applying it to the facts of this case). Unlike the injured worker in *Watson*, Mr. Tierney is a member of a dispatching labor union and was not

required to engage in work searches to receive unemployment. (CP at 313; *see also* RCW 50.20.240(b); WAC 192-180-010(c)). He needed only to place his name on the dispatch list; once doing so, there were no consequences to his unemployment benefits if he missed dispatch calls, failed to report to work, failed to meet site requirements, or turned jobs back in after dispatch—even though those activities could ultimately affect Mr. Tierney's place on the dispatch list and as a result negatively impact his probability of getting work. (CP at 150). For those reasons it does not follow that Mr. Tierney's receipt of unemployment benefits should not be considered evidence of his intent to work full-time. More importantly, the Superior Court found Mr. Tierney "received unemployment benefits while unemployed" (CP at 613, ¶ 5), but did not expressly find that this fact was grounds for its finding that Mr. Tierney intended to work full-time.

Putting Mr. Tierney's actions into context, it becomes clear the gaps in Mr. Tierney's employment history do not comport with a worker actively seeking work, but unable to find it due to an economic downturn. A witness from Mr. Tierney's labor union, Mr. Dines, testified that Local 26 was "doing great" from "2004 to 2008 and 9" in particular due in part to projects started prior to the downturn. (CP at 256). It was in "mid-2010" that the economic downturn hit Local 26 and had a major impact on dispatches and available work, particularly on the plumbing side of the union's operations. (CP at 257). In 2010, when the full impact of the downturn hit Local 26, dispatch records show Mr. Tierney was dispatched

to five jobs. (CP at 490). Of those, Mr. Tierney "did not report" to two, turned one back in, and was rejected from a fourth—all for uncertain or unknown reasons—leaving only one dispatch, a job at Kiewitt Pacific from August 4, 2010 to September 23, 2010, to which Mr. Tierney successfully reported for work. (*Id.*). Taken in this light, Mr. Tierney's behavior is not that of an individual who occasionally missed work due to illness or unforeseen car trouble, but of an individual, who during a time when it was difficult for individuals in his profession to find work, squandered opportunity after opportunity to work, all without impact on his receipt of unemployment benefits. (*See* CP at 242).

Harder urges the Court of Appeals to hold this finding of fact was not supported by substantial evidence as the record shows that regardless of Mr. Tierney's stated intent, his actions demonstrate he did not seek to work full-time. After all as the Board of Industrial Insurance Appeals observed in *In re John Pino*, Dckt. Nos. 91 5072 &92 5878 (Feb. 2, 1994), "In some cases a worker's stated intent may be completely undercut by a historical pattern or other actions that discredit the stated intent." Harder contends this is one such case.

3. The Court Erred in Failing to Make a Finding of Fact with Regard to Claimant's Relation to the Current Employer

As discussed in Section III.C, *supra* there was evidence in the record regarding Mr. Tierney's relationship with the current employer,

Harder, yet no finding of fact was made with regard to this issue, despite this being a factor that must be considered under *Avundes*.

Harder contends the evidence shows Mr. Tierney was hired to perform a job expected to last 4 days, and had no expectation of permanent employment with Harder. (CP at 194, 327–28). There was no contrary evidence in the record. Both the Board and the Superior Court should have made a finding of fact with regard to this relationship, but they did not. This failure to make a finding, despite evidence to support such a finding, impaired the Superior Court's ability to apply the *Avundes* test (discussed *infra* in Section VI.C), and resulted in an untenable outcome.

4. The Court of Appeals Erred in Failing to Make a Specific Finding Regarding Mr. Tierney's Employment History

As discussed in greater detail in Section IV.C.2., *infra*, another one of the four factors in the *Avundes* test is a worker's employment history. The closest the Superior Court got to making a finding on this issue, is one sentence in paragraph five of its Findings of Fact: "However, his [Mr. Tierney's] work history in the five years prior to his industrial injury consisted of alternating periods of employment and unemployment." (CP at 613, ¶ 5). Harder does not dispute this finding, rather it contends the court should have made an explicit finding with regard to Mr. Tierney's work history, and whether his work history was intermittent. This fact needs to be found so that the *Avundes* test can be properly applied. This

contention will be discussed in greater detail in section IV.C.2. as many of the facts and evidence of the court's opinion not formalized into a finding of fact, is also entwined with the court's apparent misunderstanding and misapplication of the *Avundes* test. A clear summary of the evidence supporting a factual finding that Mr. Tierney's work history was intermittent, can be found at in the Board's original Decision and Order:

> Mr. Tierney's work history, beginning in 2007 up until his April 11, 2012 industrial injury, consisted of alternating period of employment and unemployment and in the year prior to the injury, his periods of employment included April 13, 2011, through May 12, 2011; June 1, 2011; March 14, 2012 through March 27, 2012; and April 6, 2012 through the date of injury."

(CP at 66; *see also* CP at 490 (showing union dispatch history) and CP at 500–17 (union pension and welfare trust's accounting of Mr. Tierney's hours worked in various jobs in the years prior to the April 2012 injury)).

The Superior Court should have made an explicit finding regarding Mr. Tierney's employment history as the record was replete with evidence supporting a finding and the finding was needed to reach the court's ultimate legal conclusion; however, the court failed to do so.

C. The Statutory Framework and Case Law Governing the Determination of Wage Rates

1. The Statutory Framework and the *Avundes* Test

The formula and rules for calculating an injured worker's wage rate are found in RCW 51.08.178. The statute has four subsections. The

central dispute in this case is whether Mr. Tierney's wage rate should be calculated pursuant to subsection (1) or subsection (2).

The statute provides in pertinent part:

> (1) For the purposes of this title, the monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed unless otherwise provided specifically in the statute concerned. In cases where the worker's wages are not fixed by the month, they shall be determined by multiplying the daily wage the worker was receiving at the time of the injury:
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> (a) By five, if the worker was normally employed one day a week;
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> (b) By nine, if the worker was normally employed two days a week;
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> (c) By thirteen, if the worker was normally employed three days a week;
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> (d) By eighteen, if the worker was normally employed four days a week;
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> (e) By twenty-two, if the worker was normally employed five days a week;
>
> (f) By twenty-six, if the worker was normally employed six days a week;
>
> (g) By thirty, if the worker was normally employed seven days a week.
>
> The term "wages" shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire, but shall not include overtime pay except in cases under subsection (2) of this section. As consideration of like nature to board, housing, and fuel, wages shall also include the employer's payment or

> contributions, or appropriate portions thereof, for health care benefits unless the employer continues ongoing and current payment or contributions for these benefits at the same level as provided at the time of injury. However, tips shall also be considered wages only to the extent such tips are reported to the employer for federal income tax purposes. The daily wage shall be the hourly wage multiplied by the number of hours the worker is normally employed. The number of hours the worker is normally employed shall be determined by the department in a fair and reasonable manner, which may include averaging the number of hours worked per day.
>
> (2) In cases where (a) the worker's employment is exclusively seasonal in nature or (b) the worker's current employment or his or her relation to his or her employment is essentially part-time or intermittent, the monthly wage shall be determined by dividing by twelve the total wages earned, including overtime, from all employment in any twelve successive calendar months preceding the injury which fairly represent the claimant's employment pattern.

RCW 51.08.178(1)–(2).

The Washington Supreme Court has held that subsection (1) is the "default provision" and "must be used unless the Department establishes it does not apply." *Dep't of Labor and Indus. v. Avundes*, 140 Wn.2d 282, 290 (2000). The primary exception to this is the provision for the averaging of wages of seasonal or intermittent workers as defined by subsection (2) of the same statute. RCW 51.08.178(2). In *Avundes* the Supreme Court adopted the Board's reasoning in the nonsignificant decision *In re John Pino*, Dckt. No. 91 5072 (Feb. 2, 1994):

> [t]he Department must first determine whether the type of employment is "essentially intermittent" within the meaning of the statute. If the type of work is intermittent, subsection (2) applies. If the type of employment itself is not intermittent, the inquiry shifts to whether the worker's relation to the work is intermittent. The Department must consider all relevant factors, including the nature of the work, the worker's intent, the relation with the current employer, and the worker's work history.

Avundes, 140 Wn.2d at 290.

The Board has held that the sequential nature of construction-related work (such as that of pipefitters), is not itself inherently seasonal or intermittent.

> General laboring work on construction projects usually requires that the worker seek a new relationship with an employer once each project is completed. In doing so, the worker may have periods of unemployment. We do not believe that working from job to job in construction type work (2) should be considered per se part-time or intermittent work merely because there may be periods of non-work in between job assignments. Construction work, or any other work, that may require the worker to establish an employment relationship with several different employers, back to back or in succession, should be viewed as essentially full-time work and not essentially part-time or intermittent, unless rebutted by the Department. We do not believe the Department may speculate that a worker will not have work available continuously in the future and, based on such speculation, classify the worker as "part-time" or "intermittent". We do not believe the statute intended this result. We do not believe that this method "fairly represents" the worker's monthly wage or "employment pattern."

In re Deborah Guaragna (Williams), BIIA Dec. 90 4246 (1992).

The parties did not dispute whether the nature of Mr. Tierney's work in a construction-related field was essentially part-time or intermittent, so the decision in this case has revolved around the question of whether Mr. Tierney's *relation* to work was essentially part-time or intermittent.

2. The *Avundes* Test was Misapplied

In *Department of Labor and Industries v. Avundes*, 140 Wn.2d 282 (2000), the Washington Supreme Court established a test for determining when RCW 51.08.178(2)(b) should be used to calculate an injured worker's monthly wage. *Avundes*, 140 Wn.2d at 286–87. In doing so, they adopted a 2-part test that originated in the nonsignificant BIIA decision *In re John Pino*, Dckt Nos. 91 5072 & 925878, 1994 WL 144956 (BIIA Feb. 2, 1994) and had been applied by the Court of Appeals in *Avundes v. Department of Labor and Industries*, 95 Wn. App. 265 (1999).

> [W]hen determining which section applies, the Department must first determine whether the type of employment is "essentially intermittent" within the meaning of the statute. If the type of work is intermittent, subsection (2) applies. If the type of employment itself is not intermittent, the inquiry shifts to whether the worker's *relation* to the work is intermittent. The Department must consider all relevant factors, including the nature of the work, the worker's intent, the relation with the current employer, and the worker's work history. While making this determination, the Department must be mindful that the default provision is subsection (1); it must be used

> unless the Department establishes it does not apply.

Avundes, 140 Wn.2d at 290 (citing RCW 51.08.178(1)) (emphasis original); *see also Avundes*, 95 Wn. App. at 273 (quoting *In re Pino*, 1994 WL 144956, at *5). The court also emphasized that "workers' compensation benefits should reflect the worker's 'lost earning capacity,'" as it had held in *Double D Hop Ranch v. Sanchez*. *Avundes*, 140 Wn.2d at 287 (quoting *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 798 (1997)).

The Department proposed an alternative test that would have considered a worker to be full-time if his *current* job was "permanent and full-time," if not, determine whether RCW 51.08.178(2) should be applied based solely on an objective evaluation of the worker's work history. *Avundes*, 140 Wn.2d at When considering alternative tests proposed by the Department, the Supreme Court explained:

> [W]e find nothing in either the statute or the BIIA two-part test that requires the work used to calculate the base monthly wage also be the work used in determining the worker's relation to employment. Further, nothing in the statute or the two-part test requires the worker characterize his or her work by the last job performed. *Finally, the four factors used in the second part of the test say nothing about focusing exclusively on the current work. All factors must be reviewed.*

Avundes, 140 Wn.2d at 289 (emphasis added).

To reiterate, when applying the second prong of the *Avundes* test, the Supreme Court has identified four (4) factors and, at a minimum, all of these factors must be considered:

1. the nature of the work;
2. the worker's intent;
3. the relation with the current employer; and
4. the worker's work history.

Avundes, 140 Wn.2d at 290. Moreover, the Superior Court's mandate states "[t]he Department must consider all relevant factors, including . . ." the aforementioned four factors, which suggests additional factors and evidence may be appropriate.

The argument and discussion before the Superior Court in the instant case shows that the court, in fact, opined Mr. Tierney *did* have an intermittent relationship to work. (6/19/15 RP at 17:20–22 ("THE COURT: Well, it is clear that he had an intermittent relationship with employment in the sense of how much he actually worked."), 21:23–24 ("MR. WALLACE [Mr. Tieney's Counsel]: I believe that is in the record. There were occasions—especially, if it was a short job, you know, most of the testimony, going off memory here, was there would be an occasion where he might turn down a job because he heard that a bigger job was coming up, and you don't want to miss out on a big job when you are dispatched to a two-day job. THE COURT: Given his work experience, I'm not sure how legitimate that is."); *see also* 6/19/15 RP at 29:1–13 (the

court discussing the rate of absenteeism and missed work showed in the record as compared to Mr. Tierney's total days worked)).

But the Superior Court went on to reach its legal conclusion regarding the relationship between Mr. Tierney and his employment and completely misstated the holding and rule articulated in *Avundes*. To quote the judge: "As the order . . . in this case pointed out that the objective analysis of work history has been rejected by the Supreme Court. That's what Avundes is about basically." (6/19/15 RP at 50:1–3). The court went on to state:

> While past work history may have some relevance in understanding a worker's present or current relationship to his or her current employment, the mere fact that the worker may have a past history of part-time intermittent work is insufficient in and of itself to classify a worker's current relationship employment [sic] as part-time or intermittent.

(*Id.* at 50:7–12). The court went on to discuss Mr. Tierney's dispatches in March and April 2012 and noted Mr. Tierney had been dispatched to work on a couple of jobs during that time (working "almost two full weeks" in the month before the subject injury (*id.* at 50:16–51:1)), but gave no further discussion of Mr. Tierney's work history. The Superior Court then stated "[t]he focus for the Supreme Court in Avundes is that one looks at the lost earning capacity and not on objective work history." (*Id.* at 51:2–4).

The court is correct that the Supreme Court rejected a "'purely objective' analysis of work history" as the sole factor to determine

whether a worker had an intermittent work history, as that was one prong of the test proposed by the Department that the Supreme Court rejected. *Avundes*,140 Wn.2d at 289. Likewise, the court is correct in noting that the Supreme Court stressed the importance of finding a wage rate that represents a worker's earning capacity. *Id.* at 289–90 (citing *Double D Hop Ranch*, 133 Wn.2d at 789). But the Supreme Court did *not* say that a worker's work history was irrelevant, unpersuasive, or could not be considered. The Supreme Court also *explicitly rejected* the idea that the test it ultimately adopted should focus "exclusively on the current work." *Id.* at 289. Yet the Superior Court stopped short in both its factual findings and analysis. It did not consider the four *Avundes* factors.

In reaching its ultimate conclusion that Mr. Tierney's relationship to work was not essentially part-time or intermittent, and, thus, his monthly wage should be calculated pursuant to RCW 51.08.178(1), the court failed to consider the four factors articulated in *Avundes* despite the Supreme Court's mandate that "[a]ll factors must be reviewed." *Avundes*, 140 Wn.2d at 289. The court made findings with regard to the nature of Mr. Tierney's employment, namely that "[t]he nature of pipefitting work and plumbing work is not part-time or intermittent" (CP at 613, ¶ 6), and with regard to his intent, namely "Mr. Tierney intended to obtain full time work from the labor union." (CP at 613, ¶ 5). As discussed *infra*, Harder contends the court actually erred in reaching the latter conclusion because substantial evidence does not support a finding Mr. Tierney intended to obtain full-time work. Despite its extensive discussion of how intermittent

Mr. Tierney's pattern of work in his work history was, the court ultimately made no specific finding with regard to his work history beyond stating that it "consisted of alternating periods of employment and unemployment" (CP at 613, ¶ 5), a finding that was included in the paragraph relating to Mr. Tierney's intent to work full time. The relationship between Mr. Tierney and the employer, Harder, was not discussed and no findings of fact were made either at the Superior Court or at the BIIA below, despite the record containing sufficient evidence to find there was no expected long-term employment relationship, no expectation of ongoing employment, and no permanency (or any other facts or factors that would favor Mr. Tierney's employment at the time of injury heralding an ongoing employment relationship or any change in Mr. Tierney's relationship to work compared to that demonstrated in his work history. For example, uncontradicted testimony from Harder's witnesses indicated the job of injury was only expected to last 4 days (CP at 327:11) and there was no expectation that Mr. Tierney's work for Harder on this 4-day job would lead to longer or more permanent employment. (CP at 328:5).

Had the Superior Court applied *Avundes* in the manner described by the Supreme Court and found the facts necessary to do so, Harder contends the law dictates a finding that Mr. Tierney's *relationship* to work was essentially intermittent.

The facts here are distinguishable from those of both *Avundes*, *In re Pino*, and other cases that have applied the *Avundes* test and concluded

the worker's relationship to his employment was *not* essentially intermittent. Most of these decisions are BIIA decisions and, thus, are not mandatory authority, but may be illustrative.

In re Keith E. Craine, Dckt. No. 02 10033 (Dec. 26, 2002), a nonsignificant decision as an analogous case that Mr. Tierney has cited as justifying his argument (and the Board's decision) that his wages should be calculated under RCW 52.08.178(1). However, like *In re John Pino*, this case is easily distinguishable.

In *Craine*, the injured worker, a journeyman carpenter, was working on a job expected to work 1–2 months. *In re Keith E. Craine*, Dckt. No. 02 10033 (Dec. 26, 2002). Before the job of injury, the injured worker had experienced a period of unemployment lasting approximately two years. *Id.* Prior to that he had worked from project to project to project with some larger gaps. *Id.* Although Employment Security Department ("ESD") records showed some gaps and low earnings years, there was also evidence the injured worker had worked in Washington State or in nearby states during those years, suggesting the ESD records did not accurately reflect that injured worker's earnings and employment history. The injured worker in *Craine* testified that after he became a journeyman carpenter, it became more difficult to find consistent work due to the higher wages paid to journeyman carpenters and this explained the gaps in his employment, during which he was actively seeking work. *Id.* The Board ultimately concluded on the facts of that case the injured worker was not an intermittent employee. *Id.*

However, the differences between the instant case and *Craine* are many. In *Craine* there was no evidence the injured worker had missed work opportunities and turned down jobs due to a combination of failure to accept dispatches, turning dispatches back in, failing to report for work, being rejected from a jobsite, or failing to meet site requirements. *See id.* Likewise, there was no evidence of the injured worker in *Craine* having been unavailable to work due to incarceration. And as noted above, there was reason to believe the low earnings and employment gaps reflected on the injured worker's ESD records were inaccurate, whereas in the instant case, all parties have stipulated to the amount of the injured worker's earnings over the five years preceding his injury. (*Compare id. with* CP at 518–19). For all these reasons, *In re Keith E. Craine* is factually distinguishable. Applying the same law to the instant case should lead the court to conclude the injured worker in this case, Mr. Tierney, had an intermittent relationship to work.

The Board's decision in *In re John Pino*, Dckt. Nos. 91 5072 & 92 5878 (February 2, 1994) is particularly illuminating. Like the instant case, *Pino* involved a pipefitter who was dispatched out of his local union hall and who worked an inconsistent schedule with layoffs ranging from a few days to a few months. *Id.* In its analysis the Board stated:

> A worker's "relationship" to employment is not a purely historical question, i.e., what has gone on in the past? Most workers who engage in employment intend to remain employed, especially where the employment is by its nature full-time employment. We hasten to add that intent is

> but one factor we will consider in our analysis. *In some cases a worker's stated intent may be completely undercut by a historical pattern or other actions that discredit the stated intent.* Clearly, however, the relationship of a worker to an employment must involve at least an inquiry into the expectations of the worker, and perhaps of the employer, which expectations involve the question of intent as to future employment.

Id. (emphasis added). The Board in *In re Pino* ultimately concluded that injured worker was not an intermittent worker based on the facts of that case. But unlike Mr. Tierney, there was no evidence in the record that the injured worker had missed work turned down work, missed dispatch calls, and failed to show up for the jobs for which he was dispatched, etc.

Finally, in the *Avundes* case itself, the Court of Appeals had applied the four factors and concluded the worker's relationship to work was not part-time or intermittent. *Avundes*, 140 Wn.2d at 288. It found the worker's type of work was full-time, his intent was to work full-time, and his *work history* "showed a consistent pattern of working or looking for work." *Id.* There was no evidence regarding the fourth factor, the relation with the current employer, so that factor could not be weighed. *Id.* Since all three of the factors that could be weighed favored a finding the injured worker's relationship with work was not essentially part-time or intermittent, first the Court of Appeals and then the Supreme Court concluded the injured worker's wage should be calculated under the default provision of RCW 51.08.178(1).

In contrast, Harder maintains that if the court had applied the full *Avundes* test, made findings of fact regarding all four factors, as supported by the preponderance of evidence, and weighed all the factors, the court would have concluded Harder had met its burden of proof and concluded Mr. Tierney's relationship to employment was essentially intermittent, so his monthly wage should be calculated using RCW 51.08.178(2).

By failing to apply the *Avundes* test as described by the Supreme Court, the Superior Court (and the Board of Industrial Insurance Appeals) have effectively rendered the language of RCW 51.08.178(2)(b) superfluous, in tension with the principles of statutory interpretation.

It is well established that:

> [i]n interpreting a statute, it is the duty of the court to ascertain and give effect to the intent and purpose of the legislature, as expressed in the act. The act must be construed as a whole, and effect should be given to all the language used. Also, all of the provisions of the act must be considered in their relation to each other and, if possible, harmonized to insure proper construction of each provision.

Burlington Northern, Inc. v. Johnston, 89 Wn.2d 321, 326 (1977). If a court considers only a worker's stated intent to work full time and the work schedule of his current job, without consideration of his work history or the relationship to the current employer, it becomes difficult to see how worker's *relationship to work* could *ever* be "essentially part-time or intermittent." This interpretation and application of the *Avundes* test would render the statutory language of RCW 51.08.178(2)(b) superfluous. In this

particular case the outcome also results in a windfall to Mr. Tierney by reaching a wage rate calculation that does not reflect Mr. Tierney's earning capacity, which is, in turn, in tension with both *Avundes* and *Double D Hop Ranch* and the purpose of the Industrial Insurance Act itself.

As shown above, there is evidence to support a factual finding that Mr. Tierney's relation to Harder weighed in favor of finding him to be an intermittent employee. The court also should have found Mr. Tierney's had an intermittent work history. But the court failed to make express findings on these issues, despite the evidence in the record supporting such findings. Similarly, as discussed in section IV.B. *supra*, the court's finding that Mr. Tierney intended to work full time was not supported by substantial evidence. Thus, only one factor, the nature of Mr. Tierney's employment, weighed in favor of finding him to be a full-time employee and not a worker whose relationship to employment was essentially intermittent. Had the court correctly or fully applied the *Avundes* test, it would have reached a conclusion in favor of *Harder*.

V. Conclusion

For the reasons discussed above, the Superior Court erred in finding facts that were not supported by substantial evidence and failed to make findings with regard to several facts (such as the relationship of Mr. Tierney to Harder and the nature of Mr. Tierney's work history) that were crucial to the application of the *Avundes* test, the test endorsed by the Washington Supreme Court for determining whether a worker's wage rate

should be determined pursuant to RCW 51.08.178(2)(b). Harder respectfully request the Court of Appeals to reverse the decision of the Superior Court should be reversed and to the extent necessary, remanded for further findings of fact.

Dated this 4 day of December, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2015, a true and correct copy of the foregoing sent:

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